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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

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7 JOSE MANUEL FERNANDEZ,  
8 Petitioner,  
9 v.  
10 S. FRAUENHEIN,  
11 Respondent.

Case No. [15-cv-05576-EMC](#)

12  
13 ORDER DENYING PETITION FOR  
14 WRIT OF HABEAS CORPUS

15 I. INTRODUCTION

16 Jose Manuel Fernandez filed this action for a writ of habeas corpus pursuant to 28 U.S.C. §  
17 2254 to challenge his state court conviction for several sex offenses against a minor. For the  
18 reasons discussed below, the Court denies the petition.

19 II. BACKGROUND

20 The reporting victim is referred to in the California Court of Appeal opinion as B. Doe and  
21 Doe. Miss Doe lived in Gilroy with her mother and her four siblings. Also living in the  
22 household was her stepfather, petitioner Jose Manuel Fernandez. At the time of his arrest in April  
23 2011, Mr. Fernandez was 26 years old. At that same time, Miss Doe was 11 years old and nearing  
24 the end of sixth grade. The California Court of Appeal described the evidence:

25 According to Doe's friend Desiree, in fourth grade Doe came to  
26 school with three hickeys on her neck and told Desiree that  
defendant gave them to her. Two years later, in early 2011, Doe  
reportedly informed Desiree in the school locker room that  
defendant would sexually touch Doe. Specifically, Doe told Desiree  
that defendant would touch Doe's "boobs" and vagina, and would  
grab her hand and put it on his penis.

27 On April 18, 2011, one of Doe's brothers mentioned to a social  
28 worker at school that defendant was allegedly having sex with Doe.  
The next day a social worker contacted Doe at school and Doe

1 disclosed that defendant had molested her. The social worker then  
2 contacted the police, who took Doe to a police station in Gilroy for  
3 an interview.

4 Before the police interviewed Doe on April 19, they convinced her  
5 to participate in a “pretext call,” described by police detective Jason  
6 Smith as a monitored and recorded phone call between the victim  
7 and a suspect where the police provide guidance regarding questions  
8 to ask. The pretext call between Doe and defendant was in  
9 Spanish.<sup>3</sup> Doe stated in the call that she told a friend defendant was  
10 touching her. When Doe mentioned possibly telling her mother,  
11 defendant said “[n]o, honey ... you guys will get me in trouble” and  
12 told her “they can put me in jail.” Defendant promised that “I’m not  
13 going to touch you anymore or anything” and asked her to tell her  
14 friend that she was lying or else the friend was going to “get me in  
15 trouble, and then who’s going to take care of everybody?”

16 Footnote 3: Although they were marked as evidence but  
17 never admitted, we rely on the English language translations  
18 of the pretext call and defendant’s interrogation. We will  
19 discuss defendant’s contentions related to the trial court’s  
20 jury instructions on this point.

21 Detective Smith then interviewed Doe in English. Doe said  
22 defendant never touched her chest sexually but that when they were  
23 together in the family’s house he would try to kiss her, touch her  
24 “private part,” and grab her hand and make her “do stuff” to his  
25 penis. Doe told the detective she did not want to “touch it” and  
26 “always tried like to pull away....” Doe said she touched his penis  
27 three to four times and that he touched her private part four or five  
28 times. When asked when this would happen, Doe responded, “[l]ike  
at th[e] same time when he like, do all that other stuff.” Doe  
explained that defendant would “just like start[ ] hugging me ... and  
then that’s when he starts doing all the rest.” Later she said “he  
would hold me and then he would like start doing himself too, he  
would, like, yeah.” Doe indicated that the first incident of sexual  
touching occurred in second grade. The most recent incident had  
happened the previous month, when defendant pulled Doe’s hair to  
make her stand up from her bed and then made her “get on top of  
him” as he lay on the couch. Regarding the frequency of sexual  
touching, Detective Smith asked her if it happened “[o]nce a month,  
once a year?,” and Doe ambiguously responded “[y]eah, once, once  
or twice.”

29 During Doe’s interview, defendant arrived at the police station and  
30 was detained. Defendant was given a *Miranda* advisement  
31 (*Miranda v. Arizona* (1966) 384 U.S. 436) and was interrogated by  
32 Detective Smith and Officer Jesus Cortez, who acted both as a  
33 Spanish translator and as an interrogator. When asked about his  
34 interactions with Doe, defendant said he would sometimes hug her  
35 but that he did not “do it with bad intentions.” Later defendant  
36 admitted touching Doe’s “butt” on one occasion and that he might  
37 have also accidentally touched her vagina. After further  
38 questioning, defendant eventually said Doe touched his penis  
39 approximately three times over his pants and twice skin-to-skin.  
40 Defendant described that he would take her hand and place it on his

penis. He recalled that one such incident occurred in approximately February 2011.

Defendant also admitted touching Doe's vagina both over her clothes and skin-to-skin but said it "wasn't more than three times." Defendant recalled an incident in December 2010 when he touched Doe's vagina outside her clothes for three or four seconds and rubbed up and down. He recounted another incident in January 2011 where he touched Doe's vagina over her clothes in her bedroom. A third touching over clothing occurred one night in the living room while they were standing. Defendant said that he touched Doe's vagina at least one time skin-to-skin while they were standing in his bedroom.

At the end of the interrogation, Detective Smith told defendant that he would give him the opportunity to write Doe an apology letter. Defendant drafted two handwritten letters in Spanish, one to the mother and one to Doe. In the letter to Doe, he asked her to "forgive me for the bad that I was doing to you" and promised "it will never happen again."<sup>4</sup> In the letter to the mother, defendant said he "made a mistake with what I did with [Doe] but it never went through my mind to do anything to her," and promised the mother "[n]ever again will it happen again." Defendant was taken into custody after the interrogation.

Footnote 4: We rely on the English language translations of the letters that were admitted into evidence at trial.

On April 20, Detective Smith and Detective Wes Stanford interviewed Doe's mother about her daughter's accusations. The mother did not mention the possibility of Doe recanting and also said nothing about Doe's propensity to make up stories. Doe's mother asked if they could drop the charges against defendant and expressed concern about her ability to pay bills without defendant in the home. The detectives offered to let the mother watch the recordings of Doe's interview and defendant's interrogation but she chose not to. . . .

In May 2011, Doe attended an overnight science camp with her friends Desiree and Daisy. Daisy recalled Doe talking at night in the cabin where the girls were staying about “getting raped” by defendant and that this conduct had been going on since the third or fourth grade. Daisy said Doe mentioned defendant “[g]rabbing her real hard and making her do stuff,” and touching Doe’s vagina “all the time when her mom would leave to go to her work, which was face painting.” According to Desiree, Doe told the girls that when her mother would leave defendant at home with Doe he would touch her sexually, consistent with Doe’s statements to Desiree in early 2011 in the locker room.

Several witnesses testified at trial for the prosecution. Doe recanted her allegations against defendant at trial. She admitted that she reported defendant's alleged actions to the police, Desiree, and Daisy, but maintained that she was lying during each of those

1 disclosures. On cross-examination by defense counsel, Doe  
2 confirmed she had also recanted at the preliminary hearing. When  
3 asked why she would make up these allegations, Doe claimed that  
4 she did so because defendant was too strict and did not allow her to  
go to parties with her friends. In addition to recounting Doe's  
disclosures regarding defendant, Desiree testified that Doe's mother  
approached her during a field trip in November 2011 and told her  
that the accusations against defendant were untrue.

5 The prosecution played video recordings of Doe's interview, the  
6 pretext call, and defendant's interrogation. The jury was provided  
7 with a transcript of each of the recordings. Before playing the  
recording of Doe's interview, the trial court admonished the jury:  
8 "Ladies and gentlemen, you're going to be receiving a copy of the  
transcript. It is not part of the transcript, that is not part of the  
evidence in the case. It is being provided to you to assist you in  
following along with the DVD that is the evidence in the case."

9 Unlike Doe's interview, the pretext call was in Spanish and the  
10 transcript contained a transcription in Spanish as well as a side-by-  
11 side translation into English. Gilroy Police Officer Eustaquio  
12 Rodriguez, a fluent Spanish speaker, testified that the translation  
13 was accurate. Before playing the pretext call recording, the court  
told the jury: "Ladies and gentlemen, the same admonition I gave  
you previously, the transcript is not evidence but is to assist you in  
listening to the tape." According to the prosecutor, defense counsel  
14 received a copy of the pretext call transcript "previously."

15 Like the pretext call transcript, the transcript of defendant's  
16 interrogation (which took place in English and Spanish) included  
17 both the Spanish transcription and an English translation. Officer  
18 Cortez, who assisted in the interrogation, testified to the accuracy of  
the translation. Before it was played the court informed the jury:  
"The same admonition, ladies and gentlemen." The transcripts were  
collected from the jury after the recordings were played and,  
although marked as exhibits, were never admitted as evidence.

19 Defense witnesses included Doe's mother, who testified that Doe  
20 had a tendency to make up stories and that Doe had recanted her  
21 allegations against defendant during a walk with her on the evening  
22 of April 19. The mother also said she never saw any hickeys on  
Doe's neck and that it was "very rare" for defendant to be home  
23 alone with the children. She stated neither she nor Doe ever  
received an apology letter from defendant. Two of defendant's  
relatives testified to defendant's good character.

24 Defendant also testified. He stated that he had a second grade  
25 education. He claimed he was referring to an innocent, non-sexual  
interaction with Doe during the pretext call. Regarding the  
26 interrogation, defendant maintained that the officers had told him  
that if he was unsure of an answer he "should say yes." He admitted  
pulling Doe's hair to get her out of bed in March 2011. When  
confronted on cross-examination with his statements during the  
27 interrogation, defendant confirmed he made the statements  
attributed to him but argued none of those statements was true.  
Similarly, defendant confirmed he had rubbed his crotch during the

1 interrogation to simulate what he did to Doe but said that he never  
2 actually rubbed Doe in that way.

3 Carl Lewis testified for the prosecution as an expert in Child Sexual  
4 Abuse Accommodation Syndrome (CSAAS), which he described as  
5 a series of conditions and behaviors exhibited by children who are  
6 victims of child molestation that might seem unexpected. Lewis  
stated the behavioral categories predicted by CSAAS are: (1)  
secrecy; (2) helplessness; (3) entrapment and accommodation; (4)  
delayed, conflicted, or unconvincing disclosure of abuse; and (5)  
retraction.

7 *People v. Fernandez*, California Court of Appeal No. H038618, opinion filed February 18, 2015  
8 (“Cal. Ct. App. Opinion”) at 2-7.

9 Following the jury trial in Santa Clara County Superior Court, Mr. Fernandez was  
10 convicted of four counts of committing lewd or lascivious acts on a child (*see* Cal. Penal Code  
11 § 288(a)), and seven counts of committing lewd or lascivious acts on a child by force, violence,  
12 duress, menace, or fear of immediate and unlawful bodily injury (*see* Cal. Penal Code  
13 § 288(b)(1)). The trial court sentenced Mr. Fernandez to a total of 30 years in state prison.

14 Mr. Fernandez appealed. The California Court of Appeal affirmed his conviction in  
15 February 2015 in a reasoned decision. Docket No. 13-7 at 3. The California Supreme Court  
16 summarily denied his petition for review in May 2015. *Id.* at 75.

17 Mr. Fernandez then filed his federal petition for writ of habeas corpus. He asserted three  
18 claims: (1) his right to due process was violated because the evidence was insufficient to support  
19 one of the convictions under California Penal Code § 288(a); (2) his right to due process was  
20 violated because the evidence was insufficient to support six of the seven counts under California  
21 Penal Code § 288(b)(1); and (3) his rights to due process and trial by jury were violated when the  
22 jury was instructed that two Spanish-language recordings were the evidence and the  
23 accompanying transcripts were only to assist the jurors. The Court ordered Respondent to show  
24 cause why the petition should not be granted. Respondent has filed an answer to the petition. Mr.  
25 Fernandez has not filed a traverse, and the deadline by which to do so has long passed. The matter  
26 is now ready for decision.

### **III. JURISDICTION AND VENUE**

This Court has subject matter jurisdiction over this action for a writ of habeas corpus under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the conviction and sentence of a person convicted in Santa Clara County, California, which is within this judicial district. 28 U.S.C. §§ 84, 2241(d).

#### **IV. STANDARD OF REVIEW**

This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

The Antiterrorism And Effective Death Penalty Act of 1996 (“AEDPA”) amended § 2254 to impose new restrictions on federal habeas review. A petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. “A federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409.

The state-court decision to which § 2254(d) applies is the “last reasoned decision” of the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005). “When there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.” *Ylst*, 501 U.S. at 803. The presumption that a later summary denial rests on the same reasoning as the earlier reasoned decision is a rebuttable presumption and can be overcome by strong evidence. *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1605-06 (2016). Although *Ylst* was a procedural default case, the “look through” rule announced there has been extended beyond the context of procedural default and applies to decisions on the merits. *Barker*, 423 F.3d at 1092 n.3. In other words, when the last reasoned decision is a decision on the merits, the habeas court can look through later summary denials to apply § 2254(d) to the last reasoned decision.

12           Section 2254(d) generally applies to unexplained as well as reasoned decisions. “When a  
13 federal claim has been presented to a state court and the state court has denied relief, it may be  
14 presumed that the state court adjudicated the claim on the merits in the absence of any indication  
15 or state-law procedural principles to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011).  
16 When the state court has denied a federal constitutional claim on the merits without explanation,  
17 the federal habeas court “must determine what arguments or theories supported or . . . could have  
18 supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists  
19 could disagree that those arguments or theories are inconsistent with the holding in a prior  
20 decision of [the U.S. Supreme] Court.” *Id.* at 102.

## V. DISCUSSION

22 A. Sufficiency of the Evidence - § 288(a) Conviction Based on the Hickeys

23 Mr. Fernandez challenges the sufficiency of the evidence to support one of his convictions  
24 under California Penal Code § 288(a). Specifically, he contends that the conviction “based solely  
25 on Desiree’s claim that two years ago Doe had told her that [Mr. Fernandez] had given her  
26 hickeys” violated his right to due process. Docket No. 1 at 5. Mr. Fernandez argues that the  
27 testimony was not substantial evidence because it was uncorroborated and relayed information that  
28 Desiree had heard two years before trial. Docket No. 1-1 at 37. In Mr. Fernandez’s view,

1 “Desiree’s memory of a conversation two years ago should not be deemed to have the  
2 trustworthiness of a child who had actually experienced such an act. This is especially true here in  
3 that Doe claimed to have been asleep at the time and there is nothing in Desiree’s story confirming  
4 what Doe actually knew.” *Id.*; *see also* Docket No. 1-1 at 8-9.

5 The California Court of Appeal rejected Mr. Fernandez’s challenge to the sufficiency of  
6 the evidence to support this conviction. The appellate court identified the correct legal standard  
7 for reviewing the sufficiency of the evidence to support a conviction, *i.e.*, a conviction will be  
8 affirmed if “any rational trier of fact could have found the essential elements of the crime beyond  
9 a reasonable doubt.” Cal. Ct. App. Opinion at 11 (citations and internal quotation marks omitted).  
10 The appellate court also noted that the reviewing court does not reweigh the evidence or witness  
11 credibility, and that the testimony of a single witness is sufficient to uphold a judgment. *Id.* With  
12 regard to the § 288(a) conviction based on the hickeys, the California Court of Appeal explained:

13 Desiree testified she saw three hickeys on Doe’s neck at school one  
14 day during fourth grade and that Doe told Desiree, “my step dad  
15 gave me a hickey like when I was asleep.” The jury could  
16 reasonably credit Desiree’s testimony about what Doe told her over  
17 the contrary testimony by Doe’s mother, given Desiree’s  
18 comparative impartiality and the lack of evidence that she had any  
19 motivation to testify falsely. In contrast, Doe’s mother  
20 acknowledged at trial that she had asked the detectives soon after  
21 defendant’s arrest if she could not press charges and had also  
22 expressed concern to them about not being able to pay bills without  
23 defendant’s help. The reliability of Desiree’s testimony was further  
24 enhanced by the fact that she was not merely backing up her friend  
25 Doe, but actually contradicting Doe’s recanted version of events. A  
26 reasonable jury could therefore conclude that Doe was telling the  
27 truth in her out-of-court statement to Desiree that defendant gave her  
28 hickeys.

22 Cal. Ct. App. Opinion at 14-15.

23 As the last reasoned decision from a state court, the California Court of Appeal’s decision  
24 is the decision to which § 2254(d) is applied. *See Ylst*, 501 U.S. at 803-04; *Barker*, 423 F.3d at  
25 1091-92. Mr. Fernandez is entitled to habeas relief only if the California Court of Appeal’s  
26 decision was contrary to, or an unreasonable application of, clearly established federal law from  
27 the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the  
28 evidence presented.

The Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). A court reviewing a conviction does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt, but rather determines whether, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt may a court conclude that the evidence is insufficient. *See id.* at 324. The “prosecution need not affirmatively ‘rule out every hypothesis except that of guilt,’” and the reviewing federal court “faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *Wright v. West*, 505 U.S. 277, 296-97 (1992) (quoting *Jackson*, 443 U.S. at 326).

15       “Jackson leaves juries broad discretion in deciding what inferences to draw from the  
16 evidence presented at trial, requiring only that jurors ‘draw reasonable inferences from basic facts  
17 to ultimate facts.’” *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) (per curiam) (citing  
18 *Jackson*, 443 U.S. at 319). “[O]n habeas review, a federal court may not overturn a state court  
19 decision rejecting a sufficiency of the evidence challenge” unless “the state court decision was  
20 objectively unreasonable.” *Id.* at 2062 (internal quotation marks omitted).

21        The *Jackson* standard is applied to a crime as that crime is defined by state law. *Jackson*,  
22 443 U.S. at 324 n. 16. California Penal Code § 288(a) makes it a felony to “willfully and lewdly  
23 commit[] any lewd or lascivious act. . . upon or with the body, or any part or member thereof, of a  
24 child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the  
25 lust, passions, or sexual desires of that person or the child.”<sup>1</sup>

<sup>1</sup> The jury instruction on the § 288(a) offenses stated, in relevant part:

1       Here, Mr. Fernandez does not contend that giving a child a hickey would not qualify as a  
2 violation of § 288(a), and instead contends that Desiree's testimony was simply too little to  
3 amount to sufficient evidence to prove the event occurred. The California Court of Appeal's  
4 rejection of Mr. Fernandez's claim was not an unreasonable application of the *Jackson* standard.

5       There was conflicting evidence at trial about the hickeys. On the one hand, Desiree  
6 testified that Miss Doe showed her several hickeys on Miss Doe's neck and stated that Mr.  
7 Fernandez had caused those hickeys. Desiree, who was then 12 years old and in seventh grade,  
8 gave the following testimony about the hickeys:

9           Q. . . . When you were in the fourth grade, did she [Miss Doe]  
10 ever talk about her stepfather doing something to her?

11           A. Giving her a hickey.

12           . . .

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13           To prove that the defendant is guilty of this crime, the People must  
14 prove that:

15           1A. The defendant willfully touched any part of a child's  
16 body either on the bare skin or through the clothing;

17           OR

18           1B. The defendant willfully caused a child to touch her own  
19 body, the defendant's body, or the body of someone else,  
either on the bare skin or through the clothing;

20           2. The defendant committed the act with the intent of  
arousing, appealing to, or gratifying the lust, passions, or  
sexual desires of himself or the child;

21           AND

22           3. The child was under the age of 14 years at the time of the  
act.

23           The touching need not be done in a lewd or sexual manner. [¶]  
24 Someone commits an act *willfully* when he or she does it willingly  
25 or on purpose. It is not required that he or she intend to break the  
law, hurt someone else, or gain any advantage. [¶] Actually  
26 arousing, appealing to, or gratifying the lust, passions, or sexual  
27 desires of the perpetrator or child is not required.

28 CT 468 (CALCRIM 1110).

1 Q. What did she tell you exactly? What do you recall her  
2 telling you about the hickey?

3 A. The other day my step dad gave me a hickey like when I was  
4 asleep.

5 Q. And did you see the hickey yourself when you were in the  
6 4th grade?

7 A. Yeah, it was three of them.

8 RT 157-58. Desiree then pointed to indicate that there were two hickey marks on the left side of  
9 the neck and one hickey mark on the right side of the neck. RT 158.

10 On the other hand, Miss Doe testified that she knew that a hickey was a little bruise on the  
11 neck from being kissed on the neck, that she did not remember showing any hickeys to Desiree in  
12 the 4th or 5th grade, and that she did not remember telling Desiree that her stepfather gave her  
13 hickeys. RT 90-91. Also, Miss Doe's mother testified that she had never seen any hickeys on  
14 Miss Doe's neck, even though she would have had an opportunity for observation since she  
15 combed Miss Doe's hair occasionally. RT 382-83.

16 The conflict in the evidence does not show the evidence to be insufficient to support the  
17 conviction, as the California Court of Appeal reasonably concluded. Indeed, this was the sort of  
18 credibility dispute that is for the jury to resolve. The jury's verdict shows that the jury resolved  
19 the credibility dispute in favor of believing Desiree's testimony over that of Miss Doe and Miss  
20 Doe's mother on this point. As the California Court of Appeal noted, Desiree had no motive to  
21 testify falsely, whereas Miss Doe's mother did have a motive to testify falsely: Miss Doe's mother  
22 stood to lose a breadwinner for the household if Mr. Fernandez was convicted. Miss Doe had told  
23 the detective of several incidents where Mr. Fernandez had touched her while she was in bed  
24 sleeping or pretending to sleep, which was consistent with Desiree's testimony that Miss Doe said  
25 Mr. Fernandez gave her the hickeys while she was asleep.<sup>2</sup> Miss Doe had not been asked about

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26 <sup>2</sup> According to Miss Doe's statement to the detective, Mr. Fernandez approached her more than  
27 once while she was in bed asleep or pretending to be asleep. See CT 268 ("one time I was asleep,  
28 and then all that I can remember is that he like, he came, he laid down with me, and he just like  
started doing stuff"), 269 ("He would, like, pick up my shirt and stuff, but I didn't want to, so I'd  
like, I would pretend that I'm, I'm asleep, so I would like move around," and he eventually left),  
273 ("And once he told me if I wanted to kiss him, but I just went to sleep, like I would be asleep,  
so I would, I felt like if I would be like dreaming, so I was like talking I guess"), 280 (he would

1 the hickeys when she was questioned by the police, and at trial she testified that she did not  
2 remember showing hickeys to Desiree or telling her that Mr. Fernandez gave her those hickeys.

3       However, Miss Doe's trial testimony could reasonably have been found not credible, as  
4 she retracted almost everything she told the police even though Mr. Fernandez's statements to  
5 police largely corroborated Miss Doe's statements to police about Mr. Fernandez's sexual abuse of  
6 Miss Doe. For example, both Miss Doe and Mr. Fernandez told police that she had touched his  
7 penis several times, but at trial Miss Doe denied that happened. It was the responsibility of the  
8 jury -- and not the California Court of Appeal or this Court -- to decide whether (1) to credit  
9 Desiree's testimony that supported an inference that Mr. Fernandez gave Miss Doe the hickeys, or  
10 (2) to credit the testimony of Miss Doe, Miss Doe's mother, and Mr. Fernandez that tended to  
11 show that Mr. Fernandez did not give Miss Doe the hickeys. *See Jackson*, 443 U.S. at 326  
12 (reviewing court must presume evidentiary conflict resolved in favor of prosecution); *Cavazos v.*  
13 *Smith*, 565 U.S. 1, 7, 8 (2011) (where experts presented "competing views" as to the cause of  
14 victim's death, and jury rendered a guilty verdict, "the Ninth Circuit plainly erred in concluding  
15 that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of  
16 Appeal to think otherwise"); *see also People v. Watts*, 76 Cal. App. 4th 1250, 1259 (Cal. Ct. App.  
17 1999) ("It is well settled in California that one witness, if believed by the jury, is sufficient to  
18 sustain a verdict.")

19       Based on Desiree's testimony, a rational trier of fact could have found that Mr. Fernandez  
20 committed a lewd or lascivious act on Miss Doe. The California Court of Appeal's rejection of  
21 Mr. Fernandez's due process challenge to the sufficiency of the evidence on this § 288(a)  
22 conviction was not an unreasonable application of, or contrary to, any holding of the U.S.  
23 Supreme Court. Mr. Fernandez is not entitled to the writ of habeas corpus on this claim.

24  
25  
26       hug her while she was "pretending to be asleep"), 285 ("He like wanted to touch me, but I like was  
27 pre-, I was like really asleep, so I kept on moving around. So, and then he like pulled my hair, like  
28 off my bed, so I couldn't, like, get up"). Given Miss Doe's several statements about events that  
began when she was asleep or pretending to be asleep, a rational trier of fact could have inferred  
that Miss Doe was not literally and continuously asleep when Mr. Fernandez gave her the hickeys.

1       B. Sufficiency of the Evidence - Lewd And Lascivious Conduct By Use Of Force

2           California Penal Code § 288(b)(1) provides for an enhanced penalty when a lewd or  
3           lascivious act in violation of § 288(a) is committed “by use of force, violence, duress, menace, or  
4           fear of immediate and unlawful bodily injury on the victim or another person.”<sup>3</sup> Mr. Fernandez,  
5           who was convicted of six counts under § 288(b)(1), contends that the evidence was insufficient to  
6           support five of those six convictions for lewd and lascivious conduct by use of force. (He does not  
7           challenge the sixth conviction under § 288(b)(1), in which the use of force consisted of pulling  
8           Miss Doe’s hair to move her to another room to molest her.)

9  
10           

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<sup>3</sup> The jury instruction on the § 288(b)(1) offenses stated, in relevant part:

11           To prove that the defendant is guilty of this crime, the People must  
12           prove that:

13           1A. The defendant willfully touched any part of a child’s  
14           body either on the bare skin or through the clothing;

15           OR

16           1B. The defendant willfully caused a child to touch her own  
17           body, the defendant’s body, or the body of someone else,  
18           either on the bare skin or through the clothing;

19           2. In committing the act, the defendant used force, violence,  
20           duress, menace, or fear of immediate and unlawful bodily  
21           injury to the child or someone else;

22           3. The defendant committed the act with the intent of  
23           arousing, appealing to, or gratifying the lust, passions, or  
24           sexual desires of himself or the child;

25           AND

26           4. The child was under the age of 14 years at the time of the  
27           act.

28           Someone commits an act *willfully* when he or she does it willingly  
29           or on purpose. It is not required that he or she intend to break the  
30           law, hurt someone else, or gain any advantage. [¶] Actually  
31           arousing, appealing to, or gratifying the lust, passions, or sexual  
32           desires of the perpetrator or child is not required.

33           The *force* used must be substantially different from or substantially  
34           greater than the force needed to accomplish the act itself.

35           CT 467 (CALCRIM 1111). The instruction also defined duress, menace and fear, but those are  
36           not relevant to the habeas issues here.

1       The California Court of Appeal rejected Mr. Fernandez's claims. Under California law,  
2 the "force" necessary to support a conviction under § 288(b) must be "'substantially different from  
3 or substantially greater than that necessary to accomplish the lewd act itself.'" Cal. Ct. App.  
4 Opinion at 15 (quoting *People v. Soto*, 51 Cal. 4th 229, 242 (Cal. 2011)).

5       Such force "includes acts of grabbing, holding and restraining that  
6 occur in conjunction with the lewd acts themselves." (*People v.*  
7 *Alvarez* (2009) 178 Cal.App.4th 999, 1005, citing *People v. Babcock*  
8 (1993) 14 Cal.App.4th 383, 385 & 388 [finding sufficient evidence  
of force where the defendant grabbed the victim's hand and placed it  
on his crotch].) Defendant argues there was an insufficient showing  
of force or duress to support counts one through six.

9       During her interview, Doe stated that defendant would grab her hand  
10 and make her "do stuff" to his penis and that she "always" tried to  
11 pull away. Later, Doe said "he would hold me and then he would  
like start doing himself too...." Consistent with Doe's statements,  
12 Daisy testified that Doe told her about defendant "[g]rabbing [Doe]  
real hard and making her do stuff" and that she thought the conduct  
started in "third or fourth" grade. From this evidence, the jury could  
13 reasonably conclude that on at least seven occasions (including the  
hair pulling incident) defendant committed a lewd or lascivious act  
upon or with Doe's body by use of force "'substantially different  
from or substantially greater than that necessary to accomplish the  
lewd act itself.' [Citation.]" (*Soto, supra*, 51 Cal.4th at p. 242.)

14  
15  
16       Cal. Ct. App. Opinion at 15-16.

17       As mentioned in Section A, above, a court reviewing a challenge to the sufficiency of the  
18 evidence to support a conviction must decide whether, "after viewing the evidence in the light  
19 most favorable to the prosecution, *any* rational trier of fact could have found the essential elements  
20 of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319. This being a  
21 federal habeas action reviewing a state court conviction, relief is available only if the state court's  
22 rejection of the sufficiency of the evidence challenge was "objectively unreasonable." *Coleman v.*  
23 *Johnson*, 132 S. Ct. at 2062.

24       As the last reasoned decision from a state court, the California Court of Appeal's decision  
25 is the decision to which § 2254(d) is applied. *See Ylst*, 501 U.S. at 803-04; *Barker*, 423 F.3d at  
26 1091-92. Mr. Fernandez is entitled to habeas relief only if the California Court of Appeal's  
27 decision was contrary to, or an unreasonable application of, clearly established federal law from  
28 the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the

1 evidence presented.

2 The California Court of Appeal's rejection of the insufficient-evidence claim was not  
3 objectively unreasonable. Miss Doe gave the following statements to police detective Smith:

4 Smith: Okay. Tell me about a time where you touched him.

5 [Doe]: He would like make me touch him, like it's his, everything  
6 off and stuff, so--

7 Smith: Tell, tell me about that.

8 [Doe]: He would *grab my hand and he would like, put my hand on his, um, private*, and then he would like *make me do stuff to it*.

9 Smith: Okay. Do you know what the word "penis" means?

10 [Doe]: Yeah.

11 Smith: Okay. Is that the same as his private, or it different?

12 [Doe]: The same.

13 Smith: Okay. So tell me, tell me about a time when that happened.

14 [Doe]: I don't know, like he did that, and then I just felt weird, *like I kinda didn't wanna like touch it*, but--

15 Smith: Okay.

16 [Doe]: *I always tried like to pull away, but--*

17 Smith: When would this happen?

18 [Doe]: *Like at this same time when he like, do all that other stuff.*

19 Smith: Okay. When he, and what is 'doing all that other stuff'?

20 [Doe]: Huh?

21 Smith: When you said 'when he would do all that other stuff,' is that  
22 what we talked about before, when he would touch you and,  
23 on your private?

24 [Doe] Yeah.

25 CT 273-74 (emphasis added); *see also* RT 222 (DVD of interview played for the jury). Earlier in  
26 the interview, Miss Doe stated: "He would touch me on my private, but I would have my like  
27 clothes on and stuff." CT 270. She pointed to her crotch area to show where her "private" was.  
28 *Id.* When asked how many times these touchings happened, Miss Doe responded: "I would say

1 like, about three to four, I guess.” CT 275. She also stated again that “he just like *grabbed my*  
2 *hand out of nowhere, and then he just like made me touch him.*” CT 275. Later in the interview,  
3 she said she thought Mr. Fernandez touched her “private” four or five times. CT 277-78.

4 The jury could infer from Miss Doe’s statements during police questioning that there were  
5 at least three separate incidents where Mr. Fernandez used force on Miss Doe to commit at least  
6 six lewd acts on her. Under California law, Mr. Fernandez touching Miss Doe’s genital area, and  
7 Mr. Fernandez making her touch his penis, were two offenses even if they occurred during the  
8 same session of abuse.<sup>4</sup> As the California Court of Appeal explained, the “California Supreme  
9 Court has consistently rejected the reasoning of defendant’s argument that he cannot be convicted  
10 for more than one count per incident because Doe testified the touching occurred at the ‘same  
11 time.’” Cal. Ct. App. Opinion at 12 (citing *People v. Scott*, 9 Cal. 4th 331 (Cal. 1994), and *People*  
12 v. *Harrison*, 48 Cal. 3d 321 (Cal. 1989)) A state court’s interpretation of state law, including one  
13 announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas  
14 corpus. See *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Hicks v. Feiock*, 485 U.S. 624, 629  
15 (1988).

16 The jury rationally also could conclude that the lewd acts were committed with the force  
17 necessary for six convictions under § 288(b) based on Miss Doe’s statements that, on those three  
18 or four occasions, Mr. Fernandez “grabbed” her hand and “made [her] touch him,” that he did this  
19 at the same time he was touching her “private,” and that she “always tried” to “pull away” when  
20 Mr. Fernandez made her touch his penis. Although the force of grabbing Miss Doe’s hand and  
21 making her touch his penis may not have caused physical harm to her, it was beyond that needed  
22 to accomplish the lewd act of her touching his penis or him touching her genital area and was  
23 sufficient force to support a jury’s guilty verdict for six § 288(b)(1) offenses. In *People v. Alvarez*  
24

25 \_\_\_\_\_  
26 <sup>4</sup> The force used does not have to be part and parcel of the lewd acts, i.e., the defendant doesn’t  
27 have to, e.g., forcibly hold the child’s hand on private parts. It can be the use of force to draw the  
28 child to the defendant or to keep the child from pulling away from a defendant committing lewd  
acts, as occurred here. Also, Fernandez did not argue there were three rather than six forcible  
lewd acts, and instead argued that the physical acts described did not amount to sufficient force for  
a § 288(b)(1) conviction.

1      178 Cal. App. 4th 999 (Cal. Ct. App. 2009), the court explained that “a ‘defendant may fondle a  
2      child’s genitals without having to grab the child by the arm and hold the crying victim in order to  
3      accomplish the act. Likewise, an assailant may achieve oral copulation without having to grab the  
4      victim’s head to prevent the victim from resisting.’ Lewd conduct of this sort is punishable in and  
5      of itself. Therefore, it stands to reason that the force requirement will be deemed satisfied when  
6      the defendant uses any force that is ‘different from and in excess of the type of force which is used  
7      in accomplishing similar lewd acts....’ [¶] According to the majority of courts, this includes acts  
8      of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves.” *Id.*  
9      at 1004-05 (citations omitted); *see, e.g., People v. Cochran*, 103 Cal. App. 4th 8, 13 (2002) (“if the  
10     defendant grabs or holds a victim who is trying to pull away, that is the use of physical force  
11     above and beyond that needed to accomplish the act”); *People v. Babcock*, 14 Cal. App. 4th 383,  
12     386-87 (Cal. Ct. App. 1993) (grabbing victim’s hand and making her touch defendant’s genitals  
13     constituted sufficient force for § 288(b) conviction because these acts are not necessarily elements  
14     of the lewd acts); *People v. Pitmon*, 170 Cal. App. 3d 38, 48 (Cal. Ct. App. 1985) (defendant  
15     grabbed victim’s hand, placed it on his own genitals, and rubbed himself with the victim’s hand;  
16     “[t]here can be little doubt that defendant’s manipulation of Ronald’s hand as a tool to rub his  
17     genitals was a use of physical force beyond that necessary to accomplish the lewd act.”)

18        The California Court of Appeal’s rejection of Mr. Fernandez’s due process challenge to the  
19        sufficiency of the evidence on six of the seven § 288(b)(1) convictions was not an unreasonable  
20        application of, or contrary to, any holding of the U.S. Supreme Court. Mr. Fernandez is not  
21        entitled to the writ of habeas corpus on this claim.

22        C.      Spanish-Language Evidence

23        Two Spanish-language recordings were used at trial. The trial court mistakenly instructed  
24        the jury that the evidence was the Spanish-language recordings, rather than the English-language  
25        translations of those recordings. Mr. Fernandez contends that this erroneous instruction violated  
26        his state law rights, and his rights to a jury trial and due process. He also urges that the error was  
27        structural error, requiring automatic reversal.

1        1.     Background

2            a.     Recorded Evidence In California Courts

3            English-language and foreign-language recordings are supposed to be handled differently  
4            in trial in a California court. “When an English language recording is admitted into evidence and  
5            played for the jury, the recording itself constitutes the evidence to be considered by the jury and  
6            any transcription is considered merely an aid. However, when a recording is in another language,  
7            the proper evidence for the jury to consider is the translation of the recording and not the original  
8            non-English version.” Cal. Ct. App. Opinion at 8 (citations omitted).

9            A pattern jury instruction currently is recommended for use in trials at which foreign-  
10          language recordings are played. That instruction provides, in relevant part:

11            You (may/are about to) hear a recording [that is partially] in a  
12          foreign language. You will receive a transcript with an English  
13          language translation of that recording. [¶] You must rely on the  
14          transcript, even if you understand the language in the recording. Do  
15          not share your own translation with other jurors. Please write a note  
16          to the clerk or bailiff if you believe the translation is wrong. [If the  
17          recording is partially in English, the English parts of the recording  
18          are the evidence.]

19            CALCRIM 121 (2016 version) (brackets and parentheses in source).

20            b.     The Problem at Mr. Fernandez’s Trial

21            Three recordings were played at Mr. Fernandez’s trial. First, the prosecution introduced a  
22          video recording of detective Smith’s interview of Miss Doe, which had been conducted in English.  
23          When the DVD of the interview was played, jurors received a written transcript of the interview.  
24          The trial court instructed that the transcript of the interview “is not part of the evidence in this  
25          case. It is being provided to you to assist you in following along with the DVD that is the  
26          evidence in this case.” RT 222. (This piece of evidence is not in dispute, and only is described  
27          because it gives context to the trial judge’s comments on the Spanish-language recordings next  
28          described.)

29            Second, the prosecution introduced a tape-recording of Miss Doe’s pretext call to Mr.  
30          Fernandez. The telephone call was in Spanish. When the tape was played at trial, jurors received  
31          a written transcript of the call, with both the Spanish-language words and an English translation of

1 the words spoken. CT 298-304.<sup>5</sup> The trial court stated to the jury: “Ladies and gentlemen, the  
2 same admonition I gave you previously, the transcript is not evidence but is to assist you in  
3 listening to the tape.” RT 282.

4 Third, the prosecution introduced a videotape of the police interrogation of Mr. Fernandez.  
5 The interrogation was in Spanish. When the videotape was played at trial, jurors received a  
6 written transcript of the interrogation, with both the Spanish-language words and an English  
7 translation of the words spoken. CT 305-439. As these transcripts were being passed out to  
8 jurors, the trial court stated to the jury: “The same admonition, ladies and gentlemen.” RT 295.

9 The written transcripts of the second and third recordings were not admitted as evidence.  
10 Outside the presence of the jury, the trial court observed that the transcripts “are accompanying the  
11 exhibits but are not otherwise in evidence.” RT 350.

12 The trial court did *not* give any instruction like the CALCRIM 121 instruction block-  
13 quoted above. After instructing the jury on the law, the court gave some instructions on the  
14 deliberations, including this instruction about the recordings:

15 As I said, the exhibits will be coming in [with] you into the jury  
16 room. That will include the tapes, the CDs and DVDs. And there  
17 will be a laptop that you'll be able to play them on for your use if  
18 you wish. When and if you wish to review those, you may ask for  
19 the transcripts. The transcripts, as I remind you, are not in evidence.  
You may have the transcripts to assist you while you're watching or  
listening to any of the tapes if you wish; just ask for them and they  
will be provided and then you will need to give them back.

20 RT 619-20.

21 Ten minutes into the deliberations, the jury requested and received transcripts of the three  
22 recordings. CT 451, 453.

23  
24 \_\_\_\_\_  
25 <sup>5</sup> The transcript had three columns, with the speaker's name in the first column, the Spanish words  
spoken in the second column, and the English translation of those words in the third column. The  
first two entries illustrate the format used:

<u>SPEAKER</u>	<u>SPANISH</u>	<u>ENGLISH</u>
Jose [Fernandez]	Que paso?	What's up?
[Miss Doe]	Hey pa'?	Hey Dad?

26  
27 CT 299.  
28

1                   c.     California Court of Appeal's Decision

2                   On appeal, Mr. Fernandez argued that the erroneous instruction that the Spanish-language  
3                   recordings were the evidence violated his rights under state and federal law, and that the error was  
4                   structural error.

5                   The California Court of Appeal rejected Mr. Fernandez's claim that reversible error had  
6                   occurred. First, the appellate court noted that the State had "concede[d] that the court mistakenly  
7                   instructed the jury by repeating the same admonition for the Spanish-language recordings" that  
8                   was proper for the English-language recording. Cal. Ct. App. Opinion at 9. Next, the appellate  
9                   court rejected Mr. Fernandez's argument that the error was a structural error, explaining that the  
10                  error was "more akin to an evidentiary rather than structural error, and therefore does not require  
11                  automatic reversal." *Id.*

12                  Then, the appellate court held that there was no federal constitutional violation:

13                  Defendant also asserts the instructional error "deprived [him] of his  
14                  federal due process rights to a fair trial under the Fourteenth  
15                  Amendment of the United States Constitution because the verdict  
16                  was not based upon the unanimous verdict of twelve jurors who  
17                  heard and saw exactly the same evidence, at the same time." (Citing  
18                  *Neder v. United States* (1999) 527 U.S. 1, 8 (*Neder*).) In *Neder*, the  
19                  jury instructions omitted an element of the charged offense, which  
20                  the court found violated the defendant's Sixth Amendment jury trial  
21                  guarantee. (*Neder*, at pp. 8, 12.) Noting that "a 'very limited class  
22                  of cases'" are subject to automatic reversal, the court rejected the  
23                  defendant's claim that the error was structural and concluded that  
24                  the error was reversible unless the prosecution could show it was  
25                  harmless beyond a reasonable doubt. (*Id.* at pp. 8, 16, citing  
26                  *Chapman v. California* (1967) 386 U.S. 18.) Unlike the faulty  
27                  instruction in *Neder*, here defendant does not claim the instructions  
28                  omitted any element of the charged offenses and he does not  
                        affirmatively show how the error otherwise violated any federal  
                        constitutional protections.

23                  Cal. Ct. App. Opinion at 9-10.

24                  Finally, the California Court of Appeal applied the state law standard for evaluating errors  
25                  under California law, and found that the error was harmless. Where a "misdirection of the jury"  
26                  violates California law but does not result in the violation of a federal constitutional right, the  
27                  judgment will not be set aside "unless it appears "reasonably probable" the defendant would have  
28                  achieved a more favorable result had the error not occurred." *Id.* at 10 (quoting *People v.*

1      *Breverman*, 19 Cal. 4th 142, 149 (Cal. 1998)); *see also Breverman*, 19 Cal. 4th at 184-85 (Mosk,  
2      J., dissenting) (explaining that, in determining whether an error was prejudicial, the “reasonable  
3      probability” test usually applies to errors under California law, whereas the harmless-beyond-a-  
4      reasonable-doubt test “generally applies to error violative of the United States Constitution”).

5      On this record, we see no reasonable probability that defendant  
6      would have achieved a more favorable result with a proper jury  
7      instruction. The record discloses no evidence that any of the jurors  
8      spoke Spanish, much less that any juror retranslated the recordings.  
9      The jury’s request for the transcripts rather than the recordings  
10     during deliberation suggests that the jurors based their decision on  
11     the English translations provided in the transcripts. Further, Officers  
12     Rodriguez and Cortez testified to the accuracy of the translations of  
13     the pretext call and defendant’s interrogation, respectively, and  
14     defense counsel did not lodge any objections related to their  
15     accuracy.

16     Cal. Ct. App. Opinion at 10.

17     To summarize, the California Court of Appeal found that the error was not structural error,  
18     there was no federal constitutional violation, and the state law error was harmless error.

19     As the last reasoned decision from a state court, the California Court of Appeal’s decision  
20     is the decision to which § 2254(d) is applied. *See Ylst*, 501 U.S. at 803-04; *Barker*, 423 F.3d at  
21     1091-92. Mr. Fernandez is entitled to habeas relief only if the California Court of Appeal’s  
22     decision was contrary to, or an unreasonable application of, clearly established federal law from  
23     the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the  
24     evidence presented.

25     2.      Analysis Of Federal Constitutional Claim

26        a.      The Error Was Not A Structural Error

27     There are two broad types of constitutional errors that may occur during the course of a  
28     criminal prosecution: trial errors and structural errors. A trial error is an error that is subject to a  
29     harmlessness analysis. A structural error is a “defect affecting the framework within which the  
30     trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499  
31     U.S. 279, 310 (1991). Where a criminal proceeding is undermined by a structural error, the  
32     “criminal trial cannot reliably serve its function as a vehicle for determination of guilt or  
33     innocence,” and the defendant’s conviction must be reversed. *Id.* These cases are rare and require

1 automatic reversal. *Washington v. Recuenco*, 548 U.S. 212, 218 (2006).

2 The list of errors that the U.S. Supreme Court has found to be structural errors is short.  
3 *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005). Those errors are: a defective instruction  
4 on the beyond-a-reasonable-doubt standard, *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993); the  
5 unlawful exclusion of a member of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474  
6 U.S. 254, 264 (1986); the denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49-  
7 50, 49 n.9 (1984); a violation of the right to self-representation at trial, *McKaskle v. Wiggins*, 465  
8 U.S. 168, 177-78 n.8 (1984); the deprivation of the right to counsel, *Gideon v. Wainwright*, 372  
9 U.S. 335, 344-45 (1963); and a trial by a biased judge, *Tumey v. Ohio*, 273 U.S. 510, 531-32  
10 (1927). See *Campbell*, 408 F.3d at 1172. In the decade since *Campbell*, the Supreme Court has  
11 found only two other errors to be structural errors: a judge's unconstitutional failure to recuse  
12 himself from a multi-member appellate panel, *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909  
13 (2016); and the denial of an individual's right to counsel of choice, *United States v. Gonzalez-*  
14 *Lopez*, 548 U.S. 140, 150 (2006).

15 Mr. Fernandez argues that the instructional error violated his right to due process and jury  
16 trial right because the instructional error created the possibility that some jurors may have given a  
17 different meaning to the Spanish-language recordings. The alleged constitutional error is not a  
18 structural error. There was no instructional error that, e.g., lowered the burden of proof to less  
19 than proof-beyond-a-reasonable-doubt. See *Sullivan*, 508 U.S. at 281. Cf. *Neder v. United States*,  
20 527 U.S. 1, 8-9 (1999) (instruction that omits an element of the offense is subject to harmless-error  
21 analysis). Here, the instructional error pertained to two pieces of evidence; erroneously indicating  
22 that the two English language transcripts provided to and reviewed by the jury were not evidence  
23 when in fact they should have been treated as such, and that the Spanish-language recordings were  
24 the evidence. The instructions did not fundamentally impair the framework of the trial. Like most  
25 other instructional errors, this is a trial error subject to harmless-error analysis. See *Calderon v.*  
26 *Coleman*, 525 U.S. 141, 145, 147 (1998) (once a court finds that a constitutional error occurred in  
27 the jury instructions, it must make "further inquiry" and cannot grant habeas relief unless the court  
28 finds "that the error, in the whole context of the particular case, had a substantial and injurious

1 effect or influence on the jury’s verdict”).

2 Even if the error at Mr. Fernandez’s trial is viewed as the jury potentially being exposed to  
3 extrinsic evidence, such as a Spanish-speaking juror’s interpretation of the meaning of the  
4 recording, the petitioner would be entitled to habeas relief only if it can be established that the  
5 exposure to the extrinsic evidence had ““substantial and injurious effect or influence in  
6 determining the jury’s verdict.”” *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) (quoting  
7 *Brech v. Abrahamson*, 507 U.S. 619, 623 (1993)). The California Court of Appeal correctly  
8 determined that the claimed federal constitutional violations were trial errors subject to a  
9 harmless-error analysis, rather than structural errors. In any event, its rejection of the structural  
10 error analysis was not an unreasonable application of clearly established federal law; no Supreme  
11 Court decision has ever held such an instructional error constitutes structural error. *See Glebe v.*  
12 *Frost*, 135 S. Ct. 429, 430 (2014) (Ninth Circuit erred in holding that state supreme court  
13 unreasonably applied clearly established federal law when state supreme court failed to classify  
14 the trial court’s restriction on closing argument as structural error; even if the trial court violated  
15 the U.S. Constitution, it was not clearly established that the restriction on closing argument ranked  
16 as structural error).

17 b. The Error Was, At Most, A Harmless Constitutional Error

18 To obtain federal habeas relief for an error in the jury instructions, a petitioner must show  
19 that the error “so infected the entire trial that the resulting conviction violates due process.”  
20 *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). ““A single instruction to a jury may not be judged in  
21 artificial isolation, but must be viewed in the context of the overall charge.”” *Middleton v. McNeil*,  
22 541 U.S. 433, 437 (2004) (quoting *Boyde v. California*, 494 U.S. 370, 378 (1990)). *Cf. Neder v.*  
23 *United States*, 527 U.S. 1, 8-9 (1999) (instruction that omits an element of the offense is subject to  
24 harmless-error analysis). “Even if there is some ‘ambiguity, inconsistency, or deficiency’ in the  
25 instruction, such an error does not necessarily constitute a due process violation.” *Waddington v.*  
26 *Sarausad*, 555 U.S. 179, 190 (2009) (quoting *Middleton v. McNeil*, 541 U.S. at 436). Where an  
27 ambiguous or potentially defective instruction is at issue, the court must inquire whether there is a  
28 “reasonable likelihood” that the jury has applied the challenged instruction in a way that violates

1 the Constitution in contrast to situations where the instruction is only erroneous under State law.  
2 *Estelle*, 502 U.S at 72 & n.4; *Boyde*, 494 U.S. at 380. Cf. *Cupp v. Naughten*, 414 U.S. 141, 146  
3 (1973) (“[E]ven substantial unanimity among federal courts of appeals that the instruction in  
4 question ought not to be given in United States district courts within their respective jurisdictions  
5 is not, without more, authority for declaring that the giving of the instruction makes a resulting  
6 conviction invalid under the Fourteenth Amendment. Before a federal court may overturn a  
7 conviction resulting from a state trial in which this instruction was used, it must be established not  
8 merely that the instruction is undesirable, erroneous, or even ‘universally condemned,’ but that it  
9 violated some right which was guaranteed to the defendant by the Fourteenth Amendment.”)

10       The Sixth Amendment guarantees the criminally accused the right to a fair trial by a panel  
11 of impartial jurors. U.S. Const. amend. VI; *see Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The  
12 jury’s verdict “must be based upon the evidence developed at the trial.” *Turner v. Louisiana*,  
13 379 U.S. 466, 472 (1965). “In the constitutional sense, trial by jury in a criminal case necessarily  
14 implies at the very least that the ‘evidence developed’ against a defendant shall come from the  
15 witness stand in a public courtroom where there is full judicial protection of the defendant’s right  
16 of confrontation, of cross-examination, and of counsel.” *Id.* at 472-73. Juror exposure to  
17 extraneous influences is considered juror misconduct.

18       The California Court of Appeal’s rejection of the federal constitutional claim was not  
19 contrary to, or an unreasonable application of, clearly established federal law. The California  
20 Court of Appeal determined that Mr. Fernandez did not claim that the erroneous instruction  
21 omitted any element of the charged offenses and did not “affirmatively show how the error  
22 otherwise violated any federal constitutional violations.” Cal. Ct. App. at 10. This is a reasonable  
23 view of the record. Mr. Fernandez’s only argument is that the instruction created the *possibility*  
24 that one or more jurors *might* independently translate the recordings, but he does not demonstrate  
25 that such translating actually occurred or that there is even a reasonable likelihood of such an  
26 occurrence. Mr. Fernandez does not show that any juror did his own translation, or even that any  
27 juror spoke Spanish. And, contrary to Mr. Fernandez’s argument, the jurors were not instructed to  
28 “provide[] their own interpretation for themselves.” Docket No. 1 at 45. Thus, while he argues

1 that there was a possibility for juror misconduct *if* one or more jurors did independent translations  
2 of the recordings, he does not show that any juror did do a translation. Mr. Fernandez has not  
3 identified, nor has the Court located, a Supreme Court case holding that the mere possibility of  
4 juror misconduct establishes a violation of the defendant's constitutional right to trial by jury.  
5 *Turner* explains that the constitutional right to trial by jury is violated when the verdict is based on  
6 extraneous evidence, and does not stand for the proposition that the mere potential for exposure  
7 (as opposed to actual exposure) to extraneous evidence violates the right. *See* 379 U.S. at 472.

8 Importantly, here the accuracy of the transcripts provided to the jury was not disputed at  
9 trial, on appeal or here. Mr. Fernandez does not identify a single incorrect translation or any  
10 ambiguous phrase that might have been translated differently *if* there had been any Spanish-  
11 speaking juror who took it upon himself/herself to separately translate the document. The fact that  
12 Mr. Fernandez does not identify any inaccuracy or ambiguity in the transcript further supports the  
13 view that there was no reasonable likelihood that one or more jurors did an independent translation  
14 different from the transcript. Jurors would be unlikely to undertake an independent translation if  
15 problems were not perceived in the written translation provided by the prosecution.

16 Mr. Fernandez also overstates the problem when he argues that the "jurors who did not  
17 speak Spanish heard a jumble of meaningless sounds and would have been understandably  
18 predisposed" to let fellow jurors translate. Docket No. 1 at 46. This argument ignores that the  
19 jurors asked for and obtained the transcripts within ten minutes of commencing deliberations.  
20 There is no reasonable likelihood that jurors relied on other jurors (assuming there were any) who  
21 spoke Spanish to provide independent translations of the two recordings when they had in hand  
22 the prepared transcripts. Indeed, the fact that the jurors asked for the transcripts just ten minutes  
23 into deliberations suggests there were no jurors interested in independently translating the  
24 recordings.

25 For these reasons, it was not contrary to or an unreasonable application of clearly  
26 established Supreme Court precedent for the California Court of Appeal to conclude that the  
27 misinstruction to jurors that the Spanish-language interview (rather than the English translation of  
28 it) was the evidence did not violate Mr. Fernandez's constitutional rights.

If a constitutional error is found in the jury instructions or juror exposure to extraneous influences, the federal habeas court also must determine whether that error was harmless by looking at the actual impact of the error. *Calderon v. Coleman*, 525 U.S. at 146-47; *Sassounian*, 230 F.3d at 1108. The habeas court must apply the harmless-error test set forth in *Brecht*, 507 U.S. at 623, and determine whether the error had a ““substantial and injurious effect or influence in determining the jury’s verdict.”” *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (quoting *Breht*, 507 U.S. at 623).

Assuming arguendo that the erroneous instruction resulted in a violation of Mr. Fernandez’s constitutional rights, that error did not have a “substantial and injurious effect or influence in determining the jury’s verdict.” *Breht*, 507 U.S. at 623.<sup>6</sup>

First, although the jury was misinstructed that the Spanish-language recordings rather than the transcripts thereof were the evidence, the recordings had been played for the jurors at trial while they had the transcripts in hand with an instruction that the transcripts were being provided to assist jurors in following along with the recordings. The jury also had both the recordings and the English-language translations of those documents in the jury room as they deliberated. Further, when Mr. Fernandez testified, he was questioned at length about his statements in the recorded interrogation and conceded that he did tell the police that he had touched Miss Doe and she had touched him, although he denied that his statements to the police were true. RT 448-61.

Second, apart from Mr. Fernandez’s self-incriminating statements in the interrogation and in the pretext call recordings, there was significant other evidence against him. Mr. Fernandez had drafted letters of apology to Miss Doe and Miss Doe’s mother after his interrogation. In the letter to Miss Doe, Mr. Fernandez asked her to “forgive me for the bad that I was doing to you” and promised “it will never happen again.” Cal. Ct. App. Opinion at 4. In the letter to Miss Doe’s mother, Mr. Fernandez said he “made a mistake with what I did with” Miss Doe but it would

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<sup>6</sup> In doing the harmless error analysis, this Court does not give § 2254(d) deference to the California Court of Appeal’s analysis because that court did not decide whether a federal constitutional violation was harmless. Rather, the California Court of Appeal decided that (a) the state law error was harmless under the standard for state law errors, and (b) there was no federal constitutional error so it did not decide whether such an error was harmless.

1 never happen again. *Id.*

2 Miss Doe's statement to the police graphically and strongly incriminated Mr. Fernandez.  
3 Miss Doe recanted most of the substance of that statement at trial, but her recantation was not very  
4 credible and could well have been the product of pressure put on her by her family. *See, e.g.,* RT  
5 492-93 (sergeant Stanford testifies that Miss Doe's mother did not dispute that molestations had  
6 occurred, but did complain to him about not being able to pay the bills and possibly having to  
7 move); RT 493 (sergeant Stanford testifies that Miss Doe's mother asked him "what if she didn't  
8 want to press charges"); RT 401-02 (Miss Doe's mother testifies that prosecutor offered to show  
9 her the evidence against Mr. Fernandez but she declined to look at it because she was upset by  
10 prosecutor's tone); *but see* RT 383-84 (Miss Doe's mother testifies that she did not tell Miss Doe  
11 she wanted the family to get back together and get Mr. Fernandez out of jail). Miss Doe testified  
12 that she made up her accusations to the police because Mr. Fernandez "was too strict and did not  
13 allow her to go to parties with her friends." Cal. Ct. App. Opinion at 5. But long before speaking  
14 to the police, Miss Doe had told several friends about Mr. Fernandez's inappropriate touching, and  
15 two of those friends testified at trial. Miss Doe's friend, Desiree, had not only heard Miss Doe  
16 describe Mr. Fernandez's lewd acts, but also had seen hickeys on Miss Doe's neck a couple of  
17 years before trial when Miss Doe reported to her that Mr. Fernandez had given hickeys to Miss  
18 Doe.

19 Third, the jury deliberations were brief. The jury deliberated for less than four hours after  
20 six days of trial, and sent no questions to the court other than to ask for the transcripts. *See CT*  
21 450-51, 495. "'Longer jury deliberations weigh against a finding of harmless error because  
22 lengthy deliberations suggest a difficult case.'" *United States v. Lopez*, 500 F.3d 840, 846 (9th  
23 Cir. 2006) (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001)); *see,*  
24 *e.g., id.* at 846 (2.5 hour jury deliberations in illegal reentry case suggested any error in allowing  
25 testimony or commentary on defendant's post-arrest silence was harmless); *Velarde-Gomez*, 269  
26 F.3d at 1036 (4-day jury deliberations supported inference that impermissible evidence affected  
27 deliberations). The jury returned verdicts on all eleven counts against Mr. Fernandez and did so in  
28 less than four hours. The short deliberations suggest the jury did not struggle with this case and

1 weigh in favor of finding that any error was harmless.

2 For these reasons, this Court concludes that (1) the California Court of Appeal's  
3 determination that the incorrect instruction about the Spanish-language recordings did not violate  
4 Mr. Fernandez's federal constitutional rights was not contrary to, or an unreasonable application  
5 of, clearly established Supreme Court precedent, and (2) even assuming arguendo that the  
6 incorrect instruction resulted in a federal constitutional violation, the error did not have a  
7 substantial and injurious effect on the jury's verdict. Mr. Fernandez is not entitled to the writ on  
8 this claim.

9 D. No Certificate Of Appealability

10 A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in  
11 which "reasonable jurists would find the district court's assessment of the constitutional claims  
12 debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of  
13 appealability is **DENIED**.

14 VI. CONCLUSION

15 For the foregoing reasons, the petition for writ of habeas corpus is **DENIED** on the merits.  
16 The Clerk shall close the file.

17  
18 **IT IS SO ORDERED.**

19  
20 Dated: April 13, 2017



21  
22 EDWARD M. CHEN  
23 United States District Judge  
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